S.M.K. Mining and Construction Company, Inc. *and* Darrell Marcum. Case 9–CA–28413

March 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 25, 1991, Administrative Law Judge Michael O. Miller issued the attached decision.[1] The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support of the cross-exceptions and in response to the General Counsel's exceptions. The General Counsel filed a brief in reply to the Respondent's answering brief and in answer to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] Several paragraphs of factual narrative were inadvertently omitted from the originally issued decision. This omission was corrected by errata issued on December 26, 1991. The attached corrected decision itself inadvertently omits one paragraph of text from the judge's earlier decision. Accordingly, the following should be reinstated as the penultimate paragraph of sec. II,D of the judge's decision:

> In as much as Marcum was not an employee when he spoke with Kiscaden, Kiscaden's statement, however credited, does not violate the Act and I shall recommend dismissal of that allegation.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's conclusion that the Respondent lawfully discharged Darrell Marcum, we find it unnecessary to pass on the judge's conclusion that picketing by Marcum subsequent to the discharge decision was protected concerted activity or that subsequent threats by Marcum would warrant a denial of reinstatement.

Donald A. Becher, Esq., for the General Counsel.
Barbara L. Krause, Esq. (Smith, Heenan & Althen), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Huntington, West Virginia, on September 5, 1991,[1] based on an unfair labor practice charge filed on March 28, by Darrell Marcum, an individual, and a complaint issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on May 10, as amended at hearing. The complaint alleges that S.M.K. Mining and Construction Company, Inc. (S.M.K., the Employer or Respondent) threatened and discharged Darrell Marcum because of his protected concerted activities, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,[2] I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS; PRELIMINARY CONCLUSIONS OF LAW

S.M.K. Mining and Construction Company, Inc., a corporation, is engaged in the operation of a deep coal mine near Dunlow, West Virginia. At that facility, in the course and conduct of its business operations, it annually sells and ships products valued in excess of $50,000 directly to Pen Coal Corporation, a nonretail enterprise located within the State of West Virginia which, in turn, annually sells and ships goods, products, and materials which are valued in excess of $50,000 from its West Virginia facility directly to points outside the State of West Virginia. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Employer operates a coal mine on property leased by Pen Coal from Columbia Gas, about 10 miles from Dunlow, West Virginia. It is owned by Todd Kincaid and Michael Castle. At all material times, the superintendent of this and the Sumate mine, located on the same property, was Don L. ''Donnie'' Robertson. The second-shift foreman was David Runyon; he was the Charging Party's immediate supervisor.

S.M.K. began its mining operations on this site in June 1990. Darrell Marcum (Marcum) was hired in January; he had 18 years of deep mining experience. In March, S.M.K. had about 60 employees, working three shifts. Those employees were not represented by any labor organization.

B. *The Three-Wheeler Incident*

As of March, Marcum, still within his probationary period, was working as the scoop operator-supplyman, driving the

[1] All dates are 1991 unless otherwise specified.

[2] The General Counsel's motion to strike Respondent's reply brief is granted. There is no provision in the Board's Rules and Regulations for the filing of reply briefs in proceedings before an administrative law judge. Compare Board's Rules and Regulations, Secs. 102.42 and 102.46. In any event, given my disposition of this matter upon resolutions of factual issues, reply briefs would not aid in the decision-making process.

scoop, an 18-ton, 4-foot high, 11-foot wide, and 23-foot long vehicle, in the mine. His duties included securing supplies for the roof bolters, scooping up rock and coal dropped along the road and passageways in the mine, applying incombustible rock dust to the roofs and supports in the mine, and building brattices, the concrete block walls which are used to direct the flow of air within the mine.

On March 11, Marcum entered the mine with his foreman and the rest of the shift employees, riding a mantrip to the end of the track and then walking up to the section, where the coal is removed. He determined what supplies the roof bolters needed and drove the scoop, which had been parked in a break, out-of-the way, up to the supply area along the track. On the way back to the section, the scoop hit a three-wheeler, a golf cart-like vehicle weighing about 500 pounds which is used to move light supplies or injured miners in the mine. To Marcum's observation, not much damage was done. Subsequent inspection, however, revealed substantial damage to the axle, tires, and front end; repairs were estimated at $1200 or more. Marcum claimed that the three-wheeler had not been at that point when he drove the scoop to the supply area; Runyon said that it had not been moved from the time they entered the section and that Marcum would have had to see it when he took the scoop to the supply area.[3]

Runyon learned of the accident from the electrician and queried Marcum. Marcum acknowledged hitting the cart, claiming that he did not see it on his return trip with the scoop. Runyon told him that he did not know how long it would take to repair it or what the Employer would do about the accident. Marcum then went about his job with nothing further being said during the shift.[4]

Superintendent Robertson was not at the mine during the second shift when the accident occurred. The following morning, one of the men told him that the scoop man had run over the three-wheeler. Robertson then learned the extent of the damage from the third-shift electrician. In a conversation with Jackie Mahon, the outside man, Robertson mentioned the damage to the three-wheeler, saying, ''Whoever did it is history. I'm going to get rid of him.''[5]

Robertson called Runyon to learn more of the details. Runyon reported that Marcum should have seen the three-wheeler because it was sitting in the same place as it had been when Marcum went to the supply area; no one had moved it. Marcum, he said, had avoided hitting it on the way up and should have seen it on the way back. According to Runyon's candid testimony, Robertson said, ''I don't know what I am going to do about it right now.''[6]

In the course of that morning, Robertson spent time in one of the mines with Michael Castle, one of S.M.K.'s owners. He told Castle that the scoopman had run over the three-wheeler, that he had been generally unhappy with that employee's work performance,[7] and intended to discharge him that evening.[8]

Later that morning, a mining machine in section 1 broke down, precluding production in that part of the mine until it was repaired. In order to reduce labor costs, Robertson instructed Mahon to call three named employees and tell them not to come to work. Marcum and two others, one of whom rode with Marcum, were named. They were chosen, Robertson testified, because they lived closest to the mine and were individuals who could still be reached before they left home for work.

Mahon called Marcum and told him that Robertson had said that there would not be any work for him that evening, that Robertson would talk to him tomorrow. Marcum interpreted this as being a disciplinary layoff because he had hit the three-wheeler and protested, ''If this is over the three-wheeler . . . if I don't get to work, nobody will get to work.''[9] He insisted on speaking with Robertson.

When Robertson came to the phone, Marcum protested that the accident was not his fault and that it was not right that he be given a day off because of it. He reiterated his threat to take the matter up with the second shift and prevent anyone from working that evening if he did not work. Robertson reminded him that he was still a probationary employee and had signed a paper stating that he could be discharged at any time during the first 90 days of his employ-

[3] While Runyon's testimony is more probable, it is not necessary to resolve this minor disagreement. There is no question but that Marcum hit and damaged the scoop; the extent of his culpability for doing so is not at issue here.

[4] According to Marcum, he reported the accident to Runyon and Runyon merely said, ''shit happens,'' directing him to go about his work. While I find Runyon's testimony to be somewhat more candid and credible, I do not find Marcum's testimony to be necessarily inconsistent with that of Runyon. Had Marcum reported the accident to Runyon, he would not have described the extent of damage later observed by or reported to Runyon. If Marcum had said that the damage was slight, Runyon might well have passed the incident off as being insignificant.

[5] Mahon generally corroborated this testimony, relating that Robertson told him that ''it looked like he was going to have to get rid of a scoop man.''

[6] This statement is susceptible of several interpretations. It could mean that Robertson had not yet decided on Marcum's discharge; it could mean that he had not decided what to do about replacing or repairing the damaged three-wheeler. Robertson did not relate any such statement in his version of this conversation with Runyon. Neither did he claim to have told Runyon that he was going to discharge Marcum. Next, Robertson called Marcum. Marcum admitted hitting the cart and Robertson told him that they would talk when Marcum came in to work. According to Robertson's (albeit self-serving) testimony, it was his intention to discharge Marcum, in the presence of Runyon, at that time; he preferred not to fire someone over the telephone.

[7] The credible evidence, particularly Runyon's testimony, establishes that Marcum was reassigned from a roof bolter's position to that of scoop man because of dissatisfaction with his bolting. The dissatisfaction, particularly in regard to what was perceived as his lack of industriousness, continued while he worked as a scoop operator. Runyon testified that he discussed Marcum's performance with Robertson and they concluded that they would ''more or less . . . try to find a man and do what we had to do with Darrell [Marcum], if it was fire him, we'd, you know. Man almost had to because I give him ever[y] opportunity in the world to perform.'' This, I find, falls short of describing a firm decision to discharge Marcum at any specific time prior to the accident.

[8] Castle's testimony, while sounding somewhat pat, corroborates that of Robertson.

[9] Marcum's version, that he said that he would take this up with the second shift and that there might be no work, is not materially different.

ment if the Employer was dissatisfied with his work. His work performance was unsatisfactory, Robertson said.[10]

C. *Marcum's Picketing and Subsequent Events*

Marcum decided to make good on his threat. With his wife driving, he came to the junction of state highway 37 and Sweetwater Road, the road which leads up to the mines. He got out of the truck and stood at the intersection with a sign stating, ''Going on Strike.'' Several coal trucks, owned by Lee Sartin Trucking, the concern which hauled coal from the Pen Coal tipple at the mines, came by. They stopped and Marcum told them why he was there.[11]

The next vehicle contained three miners coming down from the mines.[12] Marcum told them why he was there and was told, in reply, that they would not cross his picket line if he was still there the next morning.

The fourth vehicle was that driven by C. K. Lang, president of Pen Coal. Lang told Marcum that he did not want any stoppage of coal shipments and asked what the problem was. He suggested that Marcum talk with Robertson and the Marcums followed him back up the road to the mine. Lang then prevailed upon Robertson to speak with Marcum.

Marcum went in to Robertson's office and repeated that he did not feel that it was right to be given a day off over running into the three-wheeler. As he recalled it, Robertson said:

> Well, you've tied [our] hands . . . . There'll not be no man work at this Company and picket one of these mines . . . . The man I work for would fire me if I let you come back to work after you've been down there. . . . Ain't no way.

With explicit leading questions, Marcum further recalled Robertson saying that he would be unable to control his men ''if he allowed that''; that Robertson referred to him ''picketing and trying to take matters up with the second shift to cause a strike here''; and finally saying that he ''was fired for picketing down there.''

Robertson, on the other hand, recalled that Marcum said that he needed the job. To this, Robertson replied:

> [W]ith everything that had happened, I couldn't reinstate him because by doing that I'd lose all the respect of my employees. . . . And, then also, I've got people that look at me and not only the operators that I work for look at me, Pen Coal would look at me, and if I let somebody go down and—or do the things that Darrell had been doing, there was no way that I could justify reinstating him. That's where we left it, right there.

Robertson admitted that he was referring to Marcum's blocking of Sartin's coal trucks as well as the three-wheeler incident and Marcum's general work performance.

Given Marcum's inability to recall, without specific leading questions, the very significant aspects of this conversation, key to his contentions, and Robertson's candor and general demeanor, I credit Robertson's version. I find that his statements were in the nature of a refusal to reconsider Marcum's discharge, previously decided upon, and were fully consistent with an understanding that Marcum had already been terminated.

On the road down from the mine, Marcum saw incoming second-shift workers. He flagged them down and told them that he been fired ''over an incident with the three-wheeler'' and for picketing and trying to get the second shift to join him. They refused to join in Marcum's protest and proceeded to the mine. As they were departing, Marcum stated '' Well, boys, I'm not responsible for what happens to you guys after dark tonight, you know.''[13]

Marcum subsequently called Robertson to reiterate his request for reconsideration. When Robertson refused, Marcum allegedly stated, ''Now, I'm going to tell you. . . . I didn't go to the penitentiary for pushing ducks in the water . . . this thing can get dirty and nasty.''[14]

One or two days after the discharge, Marcum's wife secured the telephone number of Todd Kiscaden, one of the mine's owners, and called him to discuss the discharge. Kiscaden spoke separately with both Marcum and his wife. He told Marcum that if Marcum had been standing there picketing one of his mines when he came by, he'd have ''flatten[ed him] out.'' To Marcum's wife, he stated that if he had been ''coming down the holler and somebody was out there picketing, I would probably flatten them.'' Kiscaden denied threatening to ''flatten'' anyone who was picketing but said he would not tolerate anyone trying to stop him driving down the road. I credit Marcum's testimony as corroborated by that of his wife.

Sometime later, Marcum applied for unemployment compensation and called Robertson to inquire about a form indicating the reason for his discharge. When Robertson said that their conversation would be recorded, Marcum directed his wife to similarly record it from their end, using a small microcassette recorder.[15]

According to the relevant portions of a transcript of that recording, made by Marcum's wife, Robertson said that a letter stating that insubordination was the reason for the termination was being put in the mail. When Marcum questioned that, Robertson allegedly said, ''It has nothing to do with the

[10] Robertson, under direct examination, did not claim to have expressly told Marcum that he was discharged. On cross-examination, he asserted that Marcum knew by the end of that heated conversation that he was terminated. Marcum claimed to have heard no such statement.

[11] It is alleged that Marcum's pickup truck was driven in front of the first truck and blocked the second. Because of inconsistencies in the drivers' recollections as to whether the second truck was actually blocked by that pickup, I credit Marcum and his wife in finding that there was no actual blockage. I do find it credible that, as driver Jude testified, the Marcum vehicle passed in front of his truck and stopped alongside it. Jude's identification of Marcum as the driver of the pickup was an innocent and insignificant mistake.

[12] They were not identified as S.M.K. employees. As the shift had not yet changed in the S.M.K. mine, it would appear possible that they were employees of the Sumate mine.

[13] Marcum did not deny this statement which Clifford Williamson credibly attributed to him.

[14] Marcum denied making any statement to the effect of ''pushing ducks' heads under water'' or saying that things can get ''nasty and dirty.'' I credit Robertson, noting the undenied threat to his coworkers and the absence of any denial that Marcum had served time in a penitentiary.

[15] Respondent has the capacity to record calls to and from that office and did not deny that Robertson had said he was going to do so. Robertson denied, however, that a recording was made and none was adduced.

section [tape garbled at this point] or anything that happened on the section, it was the incident down the road.''

At another point, the transcript shows Marcum as saying, ''I know what you told the guys that when I said if I didn't get to work nobody was going to get to work you flew mad right then that's the reason you fired me.'' To this, Robertson appears to have replied, ''No when you said you was coming down there to picket you'd be down there and nobody else would come to work . . . [garbled for a long period] on strike sign.''

Robertson assured Marcum that the employer would not block his unemployment compensation and again suggested that Marcum merely claim that he was terminated because he could not get along with his boss. Marcum protested that he was not going to lie, Robertson said that that was not what Marcum was being asked to do, and said that he would not lie either.

D. *Analysis and Conclusions*

Assuming that Marcum was still an employee when he threatened to bring about a work stoppage and then picketed at the mine, the relevant precedent would require a conclusion that he was engaged in an activity both concerted and protected.

In *Meyers Industries*, 268 NLRB 493 (1984), and in the supplemental decision therein, at 281 NLRB 882 (1986), *Meyers I* and *Meyers II*, respectively, the Board, in reliance on *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), noted that the concepts of ''concerted activity'' and that of ''for mutual aid and protection'' were separate. It adopted the following definition of concerted activity:

> In general, to find an employee's activity to be ''concerted,'' we shall require that it be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. *[Meyers I* at 497, *Meyers II* at 885.]

With respect to the issue raised by the court in reviewing and remanding *Meyers I*,[16] concerning whether an employee's efforts to enlist others to induce group action was itself concerted, the Board, in holding that it was, expressly incorporated the standards of the line of cases identified with *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964); including *Root-Carlin, Inc*., 92 NLRB 1313, 1314 (1951); *Vought Corp*., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); and *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980). Thus, conduct which involves only a speaker and a listener and which looks toward or seeks to induce group action is concerted activity.

Moreover, such conduct remains concerted even though the other employees fail to overtly support the instigating employee's cause. See, for example, *Charles H. McCauley Associates*, 248 NLRB 346, 350 (1980), cited with approval in *Meyers II*, at 886 fn. 34.

In *Cub Branch Mining*, 300 NLRB 57 (1990), the threshold issue was whether concerted activity prompted by an individual's personal complaint was protected. The Board, in affirming the conclusions of the administrative law judge, held that it was. As there stated, at 60:

> The Board has consistently held that concerted employee action, when invoked peaceably, to further an employment claim, *such as a wrongful discharge*, albeit personal in nature, remains within the protective mantel of Section 7 of the Act. See, e.g., *Buck Brown Contracting Co*., 283 NLRB 488, 489, and cases cited at 513 (1987). . . . By this very process [workers making common cause to reverse management's judgment on a personnel matter] management was put on notice, that its work force would not stand idly by in the face of unfair treatment. . . . [S]ince the striker's endeavor was inoffensive to statutory policy, it fell within Section 7 guarantees, *without regard to whether the underlying grievance was meritorious*. [Emphasis added.]

On the basis of the foregoing, I would therefore find that the threat to involve fellow employees in a work stoppage and lawful, peaceful primary picketing engaged in to secure that involvement would, if engaged in by an employee, be both concerted and protected. I would not find that the single act of driving a small truck across the front of an incoming 18 wheeler, was so violent as to deny protection to otherwise protected activity. Neither would I find that the activity engaged in here at the foot of Sweetwater Road was an illegal secondary boycott, as asserted by Respondent.

Having said all of the foregoing in response to the parties' legal arguments, I must find it all inapplicable to the instant case. As noted above, I have concluded that Marcum was marked for discharge as soon as Robertson learned of the damage to the three-wheeler.

Whether or not Robertson had decided to discharge Marcum before the accident, the evidence satisfies me that Marcum, still in his probationary period, was not a highly valued employee. Having damaged the three-wheeler, by what appeared to Respondent to be negligent conduct, he lost whatever value he had to the Employer and was immediately slated for discharge. Thus, as soon as he learned of the accident, Robertson expressed his intention to discharge Marcum to Mahon and Castle. Even his telephone conversation with Marcum, wherein he said that they would talk about the accident when Marcum came in to work, is somewhat indicative of an intention to discipline. Moreover, Marcum's defensiveness when called by Mahon, when he erroneously jumped to the conclusion that he was being given a day off for hitting the cart, indicates an expectation of discipline.

Thus, the decision to discharge Marcum was completed, if not effectuated, before Marcum engaged in any protected concerted activity. He would have been discharged when next he arrived at the mine whether or not he engaged in any such activity.[17] Therefore, his discharge contravenes no provision of the Act and I shall recommend dismissal of this complaint.[18]

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[16] *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[17] Thus, even assuming that the General Counsel has established a prima facie showing that protected conduct was a motivating factor in the Employer's decision to discharge Marcum, the Employer has met its burden of demonstrating that he would have been discharged even if there had been no protected activity. *Wright Line*, 251 NLRB 1083, 1088 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[18] Even assuming that Marcum was discharged for having picketed at the foot of Sweetwater Road, his subsequent threats to Robertson, and particularly to the other second-shift employees, would warrant

Continued

I have no doubt that Robertson was extremely displeased by Marcum's efforts to bring about a work stoppage. His statements at the mine and in the recorded telephone conversation establish that he was. However, those statements, when considered in light of Robertson's previously uttered intention to discharge Marcum, are insufficient to establish that he would not have been discharged had he not engaged in the protected activity. At most, they tend to indicate an unwillingness to reconsider the discharge decision because of that activity.[19]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The complaint is dismissed.

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a denial of reinstatement. *Columbia Portland Cement Co*., 294 NLRB 410 fn. 1 and 415 (1989); *Axelson, Inc*., 285 NLRB 862, 866 fn. 11 (1987).

[19] Had that issue been pleaded and litigated before me, I would be inclined to find such a refusal violative of Sec. 8(a)(1). Respondent, however, was not put on notice of any such contention and to find such a violation would deny Respondent of basic due-process rights.

[20] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.